Supreme Court, U.S.
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No. 03-1522

IN THE

Supreme Court of the United States

ALBERT DURRUTHY,

Petitioner,

v.

OFFICER JENNIFER PASTOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether the Eleventh Circuit failed to follow *Hope v. Pelzer*, 536 U.S. 730 (2002)?

II. Whether the Eleventh Circuit exceeded its jurisdiction by reevaluating the sufficiency of the evidence in a qualified immunity appeal?

PARTIES TO THE PROCEEDING

The parties to the proceeding are Petitioner Albert Durruthy and Respondent Officer Jennifer Pastor. The City of Miami has been served as an interested party.

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STATEMENT OF THE CASE

The Petitioner's statement of the case does not adequately describe the facts. We rely on the facts as stated in the opinion of the circuit court:

> The relevant facts are straightforward. On April 22, 2000, United States government officials removed a young boy, Elian Gonzalez, from his uncle's house to facilitate the boy's return to his father in Cuba. The reaction in some parts of Miami was immediate and violent. Protestors took to the streets and, as the Plaintiff said, "that was the day of the riots in Miami." Durruthy Dep. at 17. Some people threw trash bins into the streets and set them on fire. Others threw bottles, rocks, and broken glass. At the major intersection of N.W. 27th Avenue and Flagler Street (one of the intersection's roads has six lanes, the other four), the scene was chaotic during some of the morning. Police were trying to clear the intersection of people and cars. Protesters were arrested at that location. Many cameramen were on hand, including Durruthy.
>
> By Durruthy's account, he knew that Miami police officers were trying to clear the street. He observed that throughout the day he was "shooting officers arresting protesters, clearing the street, and I was shoulder to shoulder with these officers. And officers would grab me and say please, once you get your shot, please go back from the street, from tear gas, from launching tear gas, from arresting protesters." Durruthy Dep. at 78.

By 11:00 a.m. the intersection of Flagler Street and N.W. 27th Avenue was shut off to vehicular traffic, and police officers had cleared the demonstrators from the street. At that time, the police arrested a cameraman, Bruce Bernstein ("Bernstein"), and escorted him through the middle of the cleared street. Durruthy, a freelance cameraman who was on assignment to film the protests, ran into the street to film Bernstein's arrest up close.

The scene that followed was captured on a series of videotapes filmed by different people (including Durruthy) and from different locations. While Durruthy was filming Bernstein's arrest in the street, an officer instructed Durruthy to get out of the street. Durruthy backpedaled toward the sidewalk, while continuing to film Bernstein's arrest. As Durruthy approached the sidewalk, Officer Pastor grabbed him from behind. Pastor and another officer then pulled Durruthy onto the ground, while struggling to pin his arms behind him and handcuff him. During the struggle, the other officer also kneed Durruthy in the back. Durruthy stated, "Sir, my arm . . . please sir . . . I am going peacefully, sir." Pastor held Durruthy down with her hands, while the other officer tied Durruthy's arms behind his back with flex cuffs. Officer Pastor testified that whenever anyone is being arrested, she assumes that the person is armed with a weapon. She also said that she had never seen the Plaintiff before the day of his arrest.

> In a sworn declaration, Durruthy said that during the morning of April 22 other police officers let him enter the street, film his "shot," and return to the sidewalk on several occasions. He further stated that he had followed this procedure "countless" times during the previous four months without incident and with the permission of police. In his deposition, Durruthy testified that throughout that morning he had filmed officers arresting protestors and clearing the streets, and the officers had requested that he move out of the street once he got his "shot." Durruthy did not detail any of the specific circumstances surrounding these earlier incidents, nor did he identify any officer by name. Notably, however, Durruthy does not contend that Pastor allowed him to enter the streets at any time that day or in the past.

Durruthy v. Pastor, 351 F.3d 1080, 1084-85 (11th Cir. 2003).

Petitioner claims that "the police were *not* trying to clear the street/intersection on which Mr. Durruthy was filming." (Petition, at 3, emphasis in original). This is not correct. Officer Pastor testified that "we were trying to clear the intersection." (R3-59-17-18). Durruthy himself admitted this. He acknowledged that he knew that the officers were trying to clear the street, but still went out into the road. (R2-47-76-78).

The district court denied Officer Pastor's motion for summary judgment based on qualified immunity, but the circuit court reversed.

REASONS FOR DENYING THE PETITION

This petition involves no great issue of law. It instead involves the assertion that the circuit court reached the wrong result in deciding a qualified immunity appeal in a civil rights case.

I. There is no basis for certiorari based on alleged conflict with *Hope v. Pelzer*, 536 U.S. 730 (2002), since *Hope* applies when law is "clearly established" after there is a constitutional violation, but in this case there was no constitutional violation

The claim that the circuit court failed to follow *Hope v. Pelzer*, 536 U.S. 730 (2002), is not a reason for the Court to exercise its discretionary jurisdiction.

First, this argument actually alleges the misapplication of well-established law. Such a claim is not appropriate for discretionary review.

Second, the Petitioner devotes the heart of his petition to his claim that his right to not be improperly arrested and to be subjected to excessive force under the facts of this case was "clearly established." (Petition, at 6 to 9). But this issue was not resolved by the circuit court.

Under the law of qualified immunity, a court is to first determine whether the officer's conduct violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

> If no constitutional right would have been violated were the allegations established, there is no

> necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Id. at 201.

Here, the circuit court found that there was no constitutional violation. That is, it found that (1) there was probable cause for the arrest, and (2) the use of force was not excessive. There was thus no constitutional violation. *See Durruthy v. Pastor*, 351 F.3d at 1092, 1094 ("we believe Pastor had probable cause to arrest Durruthy"; "The force used to effect the Plaintiff's arrest was . . . not excessive under the Fourth Amendment.").

Since there was no constitutional violation, there is no issue concerning whether the law was "clearly established." Indeed, the circuit court noted on the excessive force claim that "[b]ecause we find no constitutional violation, we need not address whether the constitutional right at issue was clearly established." 351 F.3d at 1094-95. On the arrest claim, the circuit court stated in dicta that "even if Durruthy had actually alleged the violation of a constitutional right, such a violation was not clearly established." 351 F.3d at 1092. But this statement was pure dicta, and no basis for Supreme Court discretionary jurisdiction.

In short, the petition for certiorari is focused on the question of whether the circuit court properly decided when law is "clearly established." But since there was no constitutional violation, the "clearly established" issue is never properly reached. There is no basis for certiorari.

Finally, to the extent that the circuit court discussed in dicta when law is "clearly established," the court properly followed *Hope v. Pelzer*. The Petitioner claims that the circuit court misread this Court's instruction that an officer can be denied qualified immunity even when there is no materially similar case having held the conduct to have been unconstitutional. In fact, the circuit court opinion acknowledged this:

> No caselaw gave Pastor fair warning that she would be charged with the knowledge that other officers previously allowed Durruthy to film in the street, or that she somehow lacked probable cause to arrest Durruthy for violating § 316.130 because of that "permission." *See Williams v. Consol. City of Jacksonville*, 341 F.3d 1261, 1270 (11th Cir. 2003) (noting that in determining whether the unlawfulness of an official's actions was clearly established, "the salient question . . . is whether the state of the law [at the time of the unconstitutional act] gave [the official] fair warning that [her] alleged treatment of [the plaintiff] was unconstitutional" (quoting *Hope v. Pelzer*, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666 (2002)).

351 F.3d at 1092-93. The circuit court properly stated the law.

II. The claim that the Eleventh Circuit exceeded its jurisdiction by improperly evaluating evidence is not a reason for the Court to grant certiorari

The Petitioner's second argument, although phrased in terms of jurisdiction, is simply a complaint about the circuit court's view of what facts were established in the record. This is not a basis for this Court's discretionary review.

The law governing appellate review of rulings on qualified immunity has been established. *See Johnson v. Jones*, 515 U.S. 304 (1995); *Behrens v. Pelletier*, 516 U.S. 299 (1996). There is no need for explication or clarification of the law by this Court. We *know* what the law is.

The Petitioner's argument, instead, is that the circuit court improperly viewed the evidence. But even the Petitioner acknowledges that "factual disputes do not warrant the exercise of this high Court's jurisdiction." (Petition, at 15). It is not the function of the Supreme Court to determine whether a circuit court erred in viewing the record in a particular case.

Furthermore, the circuit court did not exceed its jurisdiction in deciding this case. The Petitioner claims that the circuit court improperly viewed the evidence concerning whether he "entered the intersection with the express permission of the police." (Petition, at 14-15). But the circuit court merely noted what the evidence established, viewed in the light most favorable to the Petitioner: that the Petitioner had been permitted by some police officers to move into the street, get his picture, and then return to the sidewalk. 351 F.3d at 1085. However, there was no evidence that the Respondent, Officer Pastor, allowed the Petitioner to do this.

Id. Based on these undisputed facts, the circuit court made a legal analysis: that under the facts known to Officer Pastor, and the controlling Florida statute, the officer had probable cause to arrest the Petitioner. Furthermore, the fact that some officers may have given the Petitioner permission to go into the street did not mean that Officer Pastor lacked probable cause to arrest based on violation of a Florida statute barring people from going into the street. 351 F.3d at 1090-91.

Finally, *Johnson v. Jones*, 515 U.S. 304, does not stand for the proposition that the circuit court is barred from reviewing the record to determine the facts. Here, the district court made no finding on the claim that the Petitioner had "permission" to be in the street. The district court never addressed the point in its opinion. Under these circumstances, the circuit court had the right—indeed, the obligation—to consider the factual basis of the argument, viewing the facts in the light most favorable to the Petitioner. *See Johnson v. Jones*, 515 U.S. at 319 (where district court does not state facts it assumed, "a court of appeals may have to undertake a cumbersome review"). *See also Brown v. Armenti*, 247 F.3d 69, 77-78 (3d Cir. 2001); *Colston v. Colston*, 146 F.3d 282, 284-85 (5th Cir. 1998); *Hoard v. Sizemore*, 198 F.3d 205, 220 (6th Cir. 1999); *Stanley v. City of Dalton*, 219 F.3d 1280, 1286-87 (11th Cir. 2000).

CONCLUSION

There is no basis for granting certiorari. Since there was no constitutional violation, and thus no violation of clearly established law, there is no conflict with *Hope v. Pelzer*. The circuit court did not improperly review the evidence, and there is no conflict with *Johnson v. Jones*. The petition for certiorari should be denied.

Respectfully submitted,

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